SUPREME COURT, U. S.

SEP 23 1969

JOHN F. DAVIS, CLERK

No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1969

HAYWOOD WASHUM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a decision of a three-judge district court (28 U.S.C. 1253, 2284) dismissing a complaint brought to set aside certain orders of the Interstate Commerce Commission (49 U.S.C. 15, 16, 17, 17a). The Commission found that appellants had [illegible] in violation of Section [illegible] A stay of judgment was granted by the district court pending appeal to this Court.

of the Interstate Commerce Act (49 U.S.C. 5(4)) and therefore that Svensson Freight Lines ("Svensson") had improvidently been granted a certificate of registration under Section 206(a)(7)(A) of the Act (49 U.S.C. 306(a)(7)(A)); (2) denied appellants' application for authority under Section 5 of the Act for the purchase by Svensson of Los Angeles-Yuma Freight Lines ("L.A.-Yuma"); and, (3) denied Svensson's ap-

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[1] Section 206(a)(7)(A) provides in part that

> In the case of any person whose motor vehicle operations on October 15, 1962, were in operation solely within a single State and consisted of common carriage by motor vehicle in interstate commerce (including persons controlled by, controlling, or under a common control with a carrier engaged in operations outside such State), and who or which was also lawfully engaged on such operations in interstate or foreign commerce under the certificate exemption provisions of the second paragraph (11) of this subsection, as in effect immediately before October 15, 1962, [etc.] the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not extend to more than the service authorized by the State certificate to be conducted in interstate commerce. [etc.] Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. [exemption] shall be held only so long as the holder is a person engaged in operations solely within a single State, but controlled by, controlling, or under a common control with a carrier engaged in operations outside such State, and except as provided in section 5 of this title and to the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission. [etc.] (Emphasis added.)

plication for common carrier interstate authority under Section 207 of the Act (49 U.S.C. 307).

L.A. Yuma, owned by Haywood Washum, is a motor common carrier authorized by the Commission to operate primarily between Los Angeles, California and Yuma, Arizona. Swanson, ostensibly owned by Haywood Washum's son, Donald Washum, holds a "grandfather" certificate of registration issued by the Commission under Section 206(a)(1) of the Act, authorizing it to engage as a single-state carrier in interstate commerce to the extent authorized by an intrastate certificate issued by the State of Arizona, primarily a restricted westbound general commodities authority from Phoenix to Yuma (I.C.S. A-17, A-19). The Commission found, however (I.C.S. Vol. A-12), that since 1957, L.A. Yuma and Swanson had been operated essentially as a single carrier by combining their respective multi-state and single-state authorities so as to perform a single-line service between Los Angeles and Arizona points including Phoenix. The Commission's finding of common control is not contested here (I.C.S.).

In August 1960, certain carriers providing service between Los Angeles and Arizona points filed a complaint alleging such a common interest between L.A. Yuma and Swanson in violation of Sections 5(4) and 5(6) of the Act (I.C.S. A-10). Subsequently, Swanson filed an application under Section 5 for authority to purchase L.A. Yuma, a grant of which would have legitimized those operations which were the subject of the complaint. Swanson also filed an application under Section 207 of the Act (49 U.S.C. 307) seeking

dently granted was not in issue either before the Commission or in the court below. Appellants attacked only the underlying finding of common control, which is not challenged in this Court. Appellants may not raise this issue for the first time in this Court. *United States* v. *Louisville Trust Co.*, 334 U. S. 54, 59.

There is no substance to the contention that appellants will be "put out of business" by the Commission's orders. L. V. Young's certificate of authority was not affected by these orders, and Swenson remains free to engage in interstate commerce to the extent authorized by its interstate certificate. Participation by Swenson in interstate movements will be terminated, but Swenson was never entitled to participate in such movements.

In the [illegible] proceedings [illegible] would result from the acquisition, appellants had the burden of showing that the public convenience and necessity required the grant of the purchase application. *Bingaman Motor Freight Lines, Inc.* v. *United States*, 243 F. Supp. 98, 99 (W. D. Texas), affirmed per curiam, 380 U. S. 160; *General Coastal Express Co.* v. *United States*, 241 F. Supp. 941, 944 (D. Nev.), affirmed *per curiam*, 382 U. S. 160. Similarly, in the Section 207 application proceeding, Swenson had the right that the public convenience and necessity required the conversion of its certificate of registration to a certificate of public convenience and necessity, as well as the grant of operating rights not authorized by its

underlying Arizona certificate. Appellants met neither of these burdens. Unlawful past operations, while not necessarily a bar to a grant of authority, ordinarily cannot be used to demonstrate continuity of prior operations (*i.e.*, as evidence to show that a grant of a certificate is required by the public convenience and necessity), so as to serve as a basis for approval of a purchase application. *Consolidated Coppersmith Lines v. United States*, 293 F. Supp. 858 (CD Calif.), affirmed *per curiam*, 391 U.S. 710; *see Gilbertville Trucking Co.*, *supra*, at 128. The Commission found (in its Order on Reconsideration, *infra*) that existing service was adequate to meet the shipping public's reasonable transportation needs, and that, therefore, no public need was shown for appellants' proposed service. Appellants virtually admit the correctness of the finding, arguing only that denial of their application would result in a "windfall" to the protestants (Br. 10). This "windfall", however, is no more than an opportunity to regain traffic unlawfully diverted from them to appellants.

3. Appellants' allegation of a question of bias on the part of the Joint Board (Br. 11) was not raised before the Commission and was raised in the district court only after it moved to dismiss. The court properly refused to consider the issue (*United States v. Carlo Bianchi & Co.*, *supra*).

Appellants erroneously interpret the authority sought under section 5(2)(c) (Br. 12). Section 5(2)(c) provides that, when a person lawfully engaged in carrier operations becomes affiliated with another carrier, the Commission may approve the transaction if it finds that the transaction will be consistent with the public interest. Section 5(2)(c) does not require the Commission to find that the public convenience and necessity will be served by the transaction, as is required by section 5(2)(a) (1) (A) for the grant of new authority. Thus, the Commission's finding that appellants' proposed service was not required by the public convenience and necessity is irrelevant to the issue of whether the transaction is consistent with the public interest.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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September 1969.

petitions, filed June 3, 1968, seeking further hearing in these proceedings, reconsideration of the Decision and Order of this Division, dated April 28, 1968, which adopted the order of the hearing examiner in No. MC F-9618 denying the section 5 application, and also adopted the orders of Joint Board No. 47 in No. MC 96784 (Sub-No. 2), denying the section 207 applications, and in No. MC C-5362, which properly found, essentially, that defendants Haywood Washum and Ben Washum, and each of them, were exercising control and management in a common interest of the operations of Haywood Washum, an individual doing business as Los Angeles-Yuma Freight Lines, a guilty State certificated carrier, with the operations of defendant Southwest Freight Lines, a single State carrier holding a certificate of registration issued under the grandfather provisions of section 206(a) of the Interstate Commerce Act, and required cancellation of the latter carrier's certificate of registration and ordered cease and desist to cease and desist operations in interstate commerce; (2) the motion of protestants, filed June 17, 1968, seeking to strike the petition in item (1) in its entirety, and (3) the reply of applicants, filed June 24, 1968, to the motion under (2); and

It appearing, That the decision and order of April 28, 1968, inadvertently failed to consider the petition of applicants, filed March 1, 1968, seeking further hearing in No. MC F-9618 and No. MC 96784 (Sub-No. 2) for the same reasons which such relief is now requested, which petition was replied to by protestants on June 24, 1968, subsequent to issuance of said decision and order; and

It further appearing, That except to the extent that applicants' petition described under (1) seeks such further hearing, applicants have no right to reconsideration of the Division's decision and order, and

no right to modification of the effective date of this Division's decision and order in view of Rule 1.101 (a)(2) of the Commission's General Rules of Practice which provides for administrative finality of Division decisions except under certain circumstances not operative here, and therefore warrants dismissal of the petition to the extent it seeks such relief;

It further appearing, That the petition under (1) also seeks further hearing and relative to the matter of whether and to what extent if any applicants had demonstrated a public need for the service proposed in No. MC F 9618 and No. MC 96781 (Sub-No. 2), and whether and to what extent protestants' service was or was not adequate to meet the transportation requirements of the shippers supporting both applications. In this connection, the record shows that two of said shippers, the San Luis Sonora, Mexico, well driller, and the customs broker with offices and warehouse facilities at San Luis, Ariz., and Calexico, Mexico, supported the application because they required for-hire transportation of traffic intended for export to Mexico which would be transported by Swanson within the confines of Arizona and which has moved from, or will move to points beyond Arizona in private carriage to Mexico, and that such transportation under the circumstances is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under part II of the act, and therefore is of no probative value relative to the matter of public need for the proposed service. See *Motor Transportation of Property Within a Single State*, 91 M.C.C. 511, 561, sustained in *The Pennsylvania Railroad Company v. United States of America and Interstate Commerce Commission*, 242 Fed. Supp. 890 (E. D. Pa., 1965), and affirmed *per curiam* in *Pennsylvania Railroad Co. v. United States, et al.*, 382 U. S. 372 (1966). The record further shows

that the remaining 8 shippers were aware of the availability of protestants' service chiefly between Phoenix, Ariz., and Los Angeles, Calif., which was considered satisfactory, but was largely untried by said shippers as opposed to their substantial reliance by such shippers on the past unlawful combined service of applicants between those points; that their support for the proposed service is predicated on their preference for single line service thereto of Svensson if the applications could be approved; and that, under these circumstances, it appears that little public need has been demonstrated by applicants for their proposed service; that public need can and will be served as well by protestants; and that, under these circumstances, the public need could not be best served by applicants' proposed service without harm to protestants. Based on the foregoing, we are of the opinion that applicants' petition under (1), to the extent it seeks further hearing, presents no facts or arguments which would establish that the said decision and order of April 28, 1968, was incorrect in finding that the findings of the hearing examiner in No. MC–F–9618 and of Joint Board No. 47 in No. MC-96784 (Sub-No. 2) were proper and correct in all material respects; or which would warrant further hearing or a different decision; and therefore, denial of the petition under (1) to the extent it seeks further hearing, is warranted; and

It further appearing, That, in view of our findings above, protestants' motion under (2) seeking to strike applicant's petition under (1) in its entirety is moot and should be dismissed:

It is ordered, That applicants' petition under (1) to the extent it seeks modification of the effective date of the decision and order of April 28, 1968, and reconsideration of the findings of said decision and order

be, and it is hereby, dismissed, and, to the extent the petition under (1) seeks further hearing in No. MC-F-9618 and No. MC-96784 (Sub-No. 2), it be, and is hereby, denied; that, further, protestants' motion under (2) to strike applicants' petition under (1) in its entirety be, and it is hereby, dismissed.

It is further ordered, That the order of April 28, 1968, shall be effective 60 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

[SEAL] H. NEIL CARSON,
Secretary.

U.S. GOVERNMENT PRINTING OFFICE: 1969